Supreme Court, U.S.
FILED
NOV 3 - 2003
OFFICE OF THE CLERK

No. 03-167

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CARLOS DOMINGUEZ BENITEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would have pleaded guilty if the violation had not occurred.

2. Whether, in deciding whether a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a court of appeals may consider the terms of a written plea agreement.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Carlos Dominguez Benitez (Respondent) respectfully submits that the petition for a writ of certiorari should be denied.

OPINIONS, MEMORANDUMS, ORDERS, AND DOCUMENTS BELOW

Respondent adopts and incorporates by reference all opinions, orders, memorandums, and documents below that are set forth in Appendices A through F to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent disagrees with the petitioner's statement of the case in a number of respects.

On May 28, 1999, the respondent and two co-defendants were charged with two counts of conspiracy to possess with intent to distribute, and possession with intent to distribute, more than 500 grams of methamphetamine, in violation of 21 U.S.C. sections 846 and 841(a)(1), respectively. Resp. C.A. ER Tabs 13. Trial was initially set for July 20, 1999; per stipulation of the parties, the court continued this date until October 19, 1999. Resp. C.A. ER Tab 13.

On September 10, 1999, the respondent filed a letter with the court requesting the appointment of new counsel and expressing his dissatisfaction with the pressure he

was under to sign a plea agreement. Resp. C.A. ER Tab 7 at 12.

On October 7, 1999, the court held a hearing at the respondent's request. At that hearing, the respondent explained to the court through a Spanish interpreter, that he was not "familiar with the Articles of the Constitution" and believed he was being treated "unfairly". Resp. C.A. ER Tab 5 at 6-7. The court noted that there was no communication between the respondent and his counsel. The government, too, characterized the case as being "paralyzed". Resp. C.A. ER Tab 5 at 10-11. Nevertheless, the court concluded that the respondent had competent counsel and did not see any grounds to remove his attorney. Resp. C.A. ER Tab 5 at 15.

On October 13, 1999, the respondent plead guilty pursuant to the plea agreement signed the previous day. Petition for Writ of Certiorari at 26(a). The Solicitor General intimates at page 7 of its petition that the district court conducted the Federal Rules of Criminal Procedure Rule 11 (Fed. R. Crim. P. 11) plea colloquy, with a written plea agreement exhibited to the court and the respondent. Neither is the case. The record is void of any actual reference to the plea agreement being present before the court or the parties at the change of plea hearing.

At the change of plea hearing, the district court gave an incomplete Rule 11(e)(2) warning that the respondent could not withdraw his guilty plea if the court did not follow the recommendations in the plea agreement[1]:

[1] The current version is found at Fed. R. Crim. P. Rule 11(c)(3)(B).

> THE COURT: Now then, in the next section of your plea agreement, there is a discussion about who is and is not a party to the plea agreement and the circumstances under which you may or may not be allowed to withdraw your guilty plea. I won't review that word by word, but I will go to paragraph 21. Resp. C.A.ER Tab 6 at 25.

The court concluded the change of plea hearing maintaining that the respondent's guilty plea was made, "freely and voluntarily" and that he "knowingly, intelligently, an voluntarily" waived his constitutional rights to go to trial. Resp. C.A. ER Tab 6 at 30.

On January 31, 2000, the respondent appeared before the court for sentencing. However, the respondent indicated that he was not prepared for sentencing, that he felt "railroading" into taking a plea, that he was still dissatisfied with his court appointed counsel, and that he had prepared a second letter for the court, stating, "I wanted to ask you for a new lawyer and when I had the chance to in court my lawyer whispered in my ear that I was not allowed to say anything to you or to speak openly with you" and "with me [sic] having a langue [sic] barrier I could not ask you if this were true. Resp. C.A. ER Tab 11 at 5-10.

On March 6, 2000, the respondent filed a third request for new counsel with the court, stating that his attorney made him "get into a state of depression." Resp. C.A. ER Tab 9 at 4.

At the March 13, 2003 sentencing hearing, the court gave the respondent the opportunity to speak on his own behalf. Once again, he expressed his dissatisfaction with his counsel stating that he never had any knowledge or

understanding about the points of responsibility, the safety valve or the laws, that he never hid anything from his attorney, and "really the crime that I committed, somebody sought me, I didn't look for the crime". Resp. C.A. ER Tab 13 at 9-10.

At sentencing, the district court asked the respondent what counsel could have been done differently in his case. The respondent replied: "[H]e should have explained to me from the beginning what is meant by the points, by the safety valve, by everything. . . . I never knew about that." *Id.* at 12. The district court confirmed that the respondent had disclosed his criminal history to his counsel before entering his guilty plea but nonetheless was advised that he would qualify for the safety valve adjustment. *Id.* at 11. The court adopted the guideline calculations set forth in its previous tentative ruling and the PSR. *Id.* at 20-21.

On appeal, the respondent raised a Fed. R. Crim. P. Rule 11(e)(2) error for the first time. He claimed that at the change of plea hearing the district court failed to give the proper Rule 11 warning that he could not withdraw his guilty plea if the sentencing recommendations set forth in his plea agreement were not adopted. In addition, the respondent raised an ineffective assistance of counsel issue. The Solicitor General misrepresents the respondent's third issue as challenging the district court's denial to substitute counsel. Petition for Certiorari at 10. Rather, the actual issue was whether the district court abused its discretion by not conducting a constitutionally adequate inquiry into respondent's motion for a substitution of attorney. Resp. C.A. Br. 21-37.

The government conceded that there had been a Rule 11(e)(2) error at change of plea hearing and agreed that under Ninth Circuit precedent the harmless error standard set forth in Fed. R. Crim. P. 11(h) prevailed. Nevertheless, the government declared in a footnote to its responsive brief that this Court had granted certiorari in *United States v. Vonn*, 531 U.S. 1189 (2001) on a decidedly similar issue which argued for a plain error standard of review. Gov't. C.A. Br. 17 n.2. The government proclaimed that the respondent could not prevail under "plain error" scrutiny due to the signed plea agreement. It reasoned that the respondent had been on Rule 11(e)(2) notice that he could not withdraw his guilty plea if the court did not adhere to the sentencing recommendations because the warning was contained in the written plea agreement. Petition for Writ of Certiorari at 34(a). Thus, argued the government, the respondent's substantial rights were not violated and plain error did not occur, even though the court failed to warn him of this consequence in open court.

On January 29, 2002, the Ninth Circuit panel issued an unpublished memorandum. The unanimous decision held that under prevailing Ninth Circuit precedent the district court had violated Rule 11(e)(2) and that the error was not harmless. Although the respondent's guilty plea was vacated and the case remanded to the district court to allow him to plead anew, acting *sua sponte*, the Court of Appeals agreed to stay the issuance of its mandate until this Court had decided *Vonn*. In the same memorandum, the court of appeals affirmed the lower court's denial to substitute counsel. *Id.* 21-23(a).

March 20, 2002, the Court of Appeals issued an order withdrawing its previous decision and required both parties to file supplemental briefs on the impact of *United*

States v. Vonn, 535 U.S. 55, which was decided by this Court, on March 4, 2002.

On November 25, 2002, a divided, Ninth Circuit panel issued its decision in a published opinion, *United States v. Benitez*, 310 F.3d 1221 (9th Cir. 2002) and once again vacated the respondent's guilty plea based on a Rule 11(e)(2) violation. *Id.* 1(a). The panel majority recognized that *Vonn* required a reviewing court to comply with Fed. R. Crim. P. Rule 52(b)'s "plain error" analysis when a Rule 11 argument is raised for the first time on appeal, and that the entire record became available for "consideration" to aid in that review. *Id.* at 7(a). In an unpublished memorandum filed the same day, the court of appeals was unanimous in affirming the constitutionality of the lower court's decision not to substitute attorneys and declined to review the claim of ineffective counsel. *Id.* 19(a).

The *Benitez* panel acknowledged that of the three types of plea agreements, the one the respondent entered into accorded such a "high degree of risk to the defendant" that the required Rule 11(e)(2) warning was of "critical importance". *Id.* at 4(a). Citing to this Court's plain-error test in, *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) the appeals court found that, "there was no question that the district court erred" and that that error was "plain". *Id.* at 5(a). Proceeding to the "substantial rights" prong of the "*Olano*" test, the court applied prevailing Ninth Circuit precedent, *United States v. Minore*, 292 F.3d 1109, 1118 (9th Cir. 2002), to determine if the error was "not minor or technical" and if the respondent "did not understand the rights at issue when he entered his guilty plea". *Id.* at 5(a). Under this two-prong test, the court of appeals found that the respondent had met both elements. *Id.* at 9(a).

Citing to *United States v. Graibe*, 946 F.2d 1428, 1433 (9th Cir. 1991), the panel majority reiterated the underlying constitutional principals embodied in Rule 11(e)(2) as an "important safeguard designed to ensure that the plea is 'intelligent' and knowing". *Id.* at 5(a). The court noted that *United States v. Chan*, 97 F.3d 1582, 1584 (9th Cir. 1996) 'qualified' *Graibe* in determining that when a defendant obtains the sentence he bargained for then the Rule 11 error was "merely technical" and would not be "set aside". Since the respondent received a substantially higher sentence than the one he bargained for, the panel majority concluded that the district court's error was "neither minor nor technical". *Id.* at 6(a).

Contrary to the Solicitor General's assertions, the panel majority *did* consider that a signed plea agreement might evidence understanding of an omitted Rule 11 warning. However, the court of appeals declined to follow the government's reasoning that inclusion of the omitted warning in the respondent's plea agreement *conclusively* showed that he was aware of Rule 11(e)(2). The panel majority distinguished the respondent's case from that of the defendant in *Vonn*. In *Vonn*, the district court failed to fully comply with the Fed. R. Crim. P. 11(c) requirement to inform the defendant of his right to counsel. Nevertheless, Vonn was twice informed of this right in open court – at his initial appearance and at his arraignment. However, the respondent's situation was decidedly distinct in that he was *never* informed in open court of the omitted warning. *Id.* at 9(a).

In this case, the court of appeals found that the written plea agreement did not "establish" that the respondent understood that he could not withdraw his guilty plea if he did not get the sentence that was recommended.

Id. at 7(a). The court relied on, *United States v. Kennell*, 15 F.3d 134, 136 (9th Cir. 1994) for the proposition that "boiler plate language" in a plea agreement is no "substitute for the rigid observance of Rule 11". *Id.* at 6(a).

Furthermore, the panel majority considered other factors that the Solicitor General neglected to include in the petition: 1) the plea agreement was read to the respondent by a Spanish interpreter and that he then signed a plea statement written in English, which is not his native language. Petition for Writ of Certiorari at 7(a). 2) both defense counsel and the prosecutor had ensured the respondent, prior to him signing the plea agreement, that he would receive the "safety valve" adjustment and the district court's colloquy stated that safety valve consideration "remains a possibility, apparently a strong one". *Id.* at 10(a); Resp. C.A. ER Tab 6 at p. 3; 19) the district court made a finding of fact that the respondent had disclosed his criminal history to his counsel before entering his guilty plea but nonetheless was advised that he would qualify for the safety valve adjustment. *Id.* at 10(a); Resp. C.A. ER Tab 13 at 11; and 4) although the district court engaged in a discussion, it never explained to the defendant that the safety valve was directly related to prior convictions. Resp. C.A. ER Tab 6 at p. 19.

This factual foundation caused the panel majority to conclude that:

> Since Benitez was unable to read English, he had no opportunity to examine the Rule 11(e)(2) provisions himself. Because his counsel and the prosecutor advised him he would in any event probably qualify for the safety valve provision and serve less than the mandatory minimum, Benitez had little incentive to attempt to ascertain the details of the [plea] agreement. *Petition for Writ of Certiorari* at 7(a)-8(a).

Furthermore, the court was not persuaded by the government's reasoning that the omitted Rule 11(e)(2) language was somehow inextricably intertwined in the colloquy statement that a sentencing court was not bound by the parties recommendations in a plea agreement. For Ninth Circuit authority, the panel majority cited to *Graibe*. *Id.* at 8(a).

Based on the above delineated factors, the panel majority concluded that the respondent did not understand the consequences of his guilty plea due to not having received the Rule 11(e)(2) warning. Furthermore, the court recognized that the respondent was induced to sign the plea based on an expectation of receiving the safety valve and a much shorter sentence. Citing to prevailing Ninth Circuit precedent in, *Torrey v. Estelle*, 842 F. 2d 234, 235 (9th Cir. 1988), the court of appeals' panel held that to hold the respondent to his plea would be a "miscarriage of injustice". *Id.* at 10(a).

Judge Tallman was the dissenting voice on the Ninth Circuit panel. *Id.* at 10(a). Applying *Vonn* to the facts of this case, it was his opinion that the signed plea agreement, plus, the district court's colloquy proved that the respondent understood the omitted Rule 11 warning. The dissent focused exclusively on the state of the relevant record, rather, than on whether the respondent would have pled guilty if not for the omitted warning. *Id.* at 10(a)-18(a).

On January 23, 2003, the government filed its petition for rehearing en banc. In the petition, the government

asked the entire Ninth Circuit Court of Appeals to review the two-panel ruling on the very same issues now presented in the Solicitor General's petition for writ of certiorari. Government's Petition for Rehearing En Banc. On May 6, 2003, the Ninth Circuit issued its order denying the petition for rehearing en banc. *Id.* at 24(a).

REASONS FOR DENYING THE WRIT

The Solicitor General presents no matters meriting review by this court. None of the issues presented by petitioner raise an important federal question or present a circuit conflict, because in each instance the court of appeals correctly applied the controlling law. The Solicitor General's arguments simply dispute the application of that law to the peculiar facts of this case – claims not worthy of review by this Court.

The Solicitor General contends that the court of appeals erred in ruling that the respondent's substantial rights were violated when the court failed to give the proper Rule 11(e)(2) warning in open court. The petitioner argues that the language in the signed plea agreement correctly tracks the precise Rule 11 warning and that the wrong standard was used to recognize when a substantial right is violated. The court of appeals' decision, however, reflects a correct application of the principles of law discussed in this Court's opinion in *Vonn,* to the particular facts of this case. Indeed, the court of appeals did "consider" that the signed plea agreement contained the omitted advisement. Nevertheless, the panel majority determined that the plea agreement merely suggested,

rather, than definitively evidenced any "knowledge" or "understanding" on the part of the respondent.

The issues here are presented in the context of a unique factual situation that is not the appropriate subject matter for granting the writ, nor does the court of appeals' decision conflict with any decision of this Court, or of another court of appeals. Accordingly, the Petition for Writ of Certiorari should therefore be denied.

A. The Panel Correctly Focused On Whether Or Not The Respondent Understood The Consequences Of His Guilty Plea Rather Than Whether He Would Not Have Plead Guilty If Not For The Error In The Rule 11 Warning.

First, the Solicitor General argues that the panel majority improperly focused on the whether the respondent was aware of the omitted right rather than if he would have plead guilty if he was given the missing advisement. *Id.* at 15. Under this singular assessment, the defendant must show that he was prejudiced, and if not for the Rule 11 error he would not have pleaded guilty. Importantly, Justice Tallman's dissent does not take up this argument. Rather, the dissent focused solely on the issue of the definitiveness of the plea agreement, the Solicitor General's second question before this Court.

In *Benitez*, the panel majority correctly followed prevailing precedent as established in this Court, as well as, in the Ninth Circuit. *Benitez* correctly followed Rule 11 principles as stated in *Vonn*, "the rule meant to ensure that a guilty plea is knowing and voluntary." *Vonn*, 535 U.S. at 55. In addition, *Benitez* is consistent with *United States v. Littlejohn*, 224 F.3d 960 (9th Cir. 2000). However, when

citing to *Littlejohn*, the petitioner omits a crucial part of this Circuit's substantial rights test. The correct citation should also include, "[i]n the absence of a defendant's actual knowledge, we have previously refused to speculate as to whether a defendant's plea would have been different given such knowledge." *Id.* at 969. Although the *Littlejohn* court found the Rule 11 error harmless, it reached "this conclusion through more than just simple speculation". *Id.* at p. 970.

Benitez recognized that before proceeding to an examination of whether the defendant would not have pleaded guilty if not for the Rule 11 error, the reviewing court must make a threshold determination on whether or not the defendant understood the omitted advisement. *Vonn* established that it is the defendant who carries this burden of persuasion. The failure to meet the burden is because either the defendant admits that he knew or the court is able to look at the whole record and know, without speculation, that the defendant understood his rights.

The Solicitor General's principal argument rests on this Court's holding in *United States v. Olano*, 507 U.S. 725, 734 (1993). Pursuant to *Olano*'s general test for determining if a "plain error" violation had occurred, the error must be shown to have affected one's substantial rights. Petitioner contends that under a Fed. R. Crim. P. 52(b) analysis of a Rule 11 violation, the burden is on a silent defendant to show that the error was prejudicial; in that the error "affected the outcome of the proceedings". Citing to ten sister circuits, the Solicitor General declares that a Rule 11 error affects substantial rights only if the defendant would not have pleaded guilty had the error not occurred. Petition for Writ of Certiorari at 15.

The petitioner, following the dissent in *Benitez*, claims that the majority's reasoning relied on Ninth Circuit precedent overruled by *Vonn*. This contention proves incorrect when one looks to other Ninth Circuit cases deciding similar issues. In *United States v. Minore*, 292 F.3d 1109 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 948 (2003), the Ninth Circuit recognized the continuation of the Rule 11 pre-*Vonn* precedents to the extent that they do not conflict with this Court's ruling. Indeed, this Court's recent refusal to grant certiorari review in *Minore* attests to this fact.

The panel majority corrected distinguished *United States v. Morales-Robles*, 309 F.3d 609 (9th Cir. 2002). Moreover, the petitioner cites to cases in footnotes 9-10 of its petition approving the *Graibe* and *Kennell* decisions as authoritative, not overruled or undercut by this Court's decision in *Vonn*. (See, *United States v. Victoriano DeJesus Pena*, 314 F.3d 1152 (9th Cir. January 9, 2003).

The Solicitor General's reliance on out-of-circuit authorities proves equally misleading. Contrary to the petitioner's argument, *United States v. Dixon*, 308 F.3d 229, 234 (3rd Cir. 2002) cannot be so narrowly referenced. In *Dixon*, the Third Circuit stated, "the defendant must show that he was prejudiced by the error, i.e., *that he did not understand the consequences of his plea* ***OR*** that, if he had been properly advised about the effect of the special parole, he would not have pled guilty." (highlights not included). The Solicitor General's petition totally ignores this "understanding" prong.

The *Dixon* court looked to the appellate briefs to ascertain whether the defendant would have proceeded to trial if he had been properly warned. In the instant case,

the respondent's opening brief clearly outlines a possible entrapment defense. Resp. Opening Brief at 28. The possibility of raising a complete defense trumps the Solicitor General's assertion that the respondent was advantaged by taking a guilty plea in favor of the three-point reduction for acceptance of responsibility. Petition for Writ of Certiorari at 23. Prosecutorial incentives, such as the efficiency of the judicial system in handling more cases, the guarantee of convictions, the allocation of financial resources, and the information provided by co-operating defendants, can be just as attractive for the government to affect a guilty plea.[2]

In *United States v. Westcott*, 159 F.3d 107, 112 (2d Cir. 1998), the Second Circuit recognized that a Rule 11 "understanding" inquiry, "must be resolved on the basis of the record, not on the basis of speculative assumptions about the defendant's state of mind." In *United States v. General*, 278 F.3d 387 (4th Cir. 2002), the Fourth Circuit required that the district court first ascertain what the defendant actually knows when he pleads guilty on the basis of an affirmative indication in the record". See *United States v. Camacho*, 233 F.3d 1308, 1322 (11th Cir. 2000); *United States v. Prado*, 204 F.3d 843, 846 (8th Cir.), *cert. denied*, 531 U.S. 1042 (2000); *United States v. Vaughn*, 7 F.3d 1533, 1535 (10th Cir. 1993); *United States v. Johnson*, 1 F.3d 296, 302-304 (5th Cir. 1993); and *United States v. Martinez*, 289 F.3d 1023, 1029 (7th Cir. 2002).

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[2] Andrew Hessick and Reshman Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. Pub. L. 189, 191 (2002).

The Solicitor General's declaration that *Benitez* is contrary to decisions in other circuits proves to be flawed. The decisions cited in the petition are not in conflict, but rather distinguishable from this case. In some, the defendants simply could not meet their burden of persuasion, unlike the respondent who received a much higher sentence than anticipated by him, his counsel, and the government. See *United States v. Martinez*, 277 F.3d 517 (4th Cir.), *cert. denied*, 123 S. Ct. 200 (2002); *United States v. Lyons*, 53 F.3d 1321, 1322 (D.C. Cir. 1995).

Other out-of-circuit cases cited by the petitioner are merely distinguishable on their facts. In *United States v. Noriega-Millan*, 110 F.3d 162, 164 fn2 (1st Cir. 1997), "the transcript of the change-of-plea hearing indicated that Noriega-Millan had read and understood a Spanish version of his plea agreement and had some understanding of English." In the instant case, a Spanish version of the plea agreement was never provided to the defendant. Therefore, the panel majority correctly found that, "[s]ince Benitez was unable to read English, he had no opportunity to examine its provisions himself" and he had "little incentive to do so." Petition for Writ of Certiorari at 7(a).

The holding in *Benitez*, recognizes and accounts for the specific circumstances particular to this case. The Solicitor General attempts to downplay these factors. In so doing, a flawed Rule 52(b) prejudicial scrutiny is inserted. This analysis inclines to sacrifice the "open court" Rule 11 safeguards and weakens the constitutional standards of a "knowing, intelligent, and voluntary" plea of guilty. Comparisons with grand jury proceedings, detention hearings, trial, and sentencing proves inaccurate:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. *Drope v. Missouri* 420 U.S. 162 (1975)

In *Addington v. Texas*, 441 U.S. 418 (1979) this Court held that the government may detain mentally unstable individuals who present a danger to the public. See *Jackson v. Indiana*, 406 U.S. 715, 731-739 (1972); *Greenwood v. United States*, 350 U.S. 366 (1956).

The Solicitor General takes an isolated sentence from the substitution of counsel hearing where the respondent stated that he had not considered going to trial. The petitioner overlooks other statements made by the respondent to the district court. The record is clear that the respondent wanted to engage in further discussion with the court but was forbidden to do so by his defense attorney. Although defense counsel declared that his client did not intend to go to trial, the respondent's view is highly speculative since he was never allowed to fully express himself.

B. The Panel Did Consider The Contents Of The Plea Agreement, Their Decision Is Not In Conflict With Any Inter-Circuit Decisions, Nor Of This Court, And Further Review Is Not, Therefore, Necessary To Secure Or Maintain Uniformity Of The Lower Court's Decisions.

Secondly, the Solicitor General argues that the panel majority failed to consider the contents of the plea agreement in determining whether a Rule 11 violation is

reversible plain error. The petition maintains that the Ninth Circuit ruling is in direct conflict with this Court in *Vonn*, other Ninth Circuit decisions and sister circuits as well. Petition for Writ of Certiorari at 15. The petitioner presents no reason why this case should be reviewed. The panel majority correctly followed this Court and Ninth Circuit precedent when it concluded that under the particular circumstances of this case, a signed plea agreement without more, merely suggested that the respondent understood the omitted advisement.

The key legal question raised by the petitioner is whether the panel majority properly applied *Vonn* when it "failed to consider" the contents of the written plea agreement in its plain error analysis. In *Vonn*, this Court confirmed that there is a shift of burdens when one moves from a harmless error standard of review to that of plain error. Under the latter standard, a defendant who remained silent while a Rule 11 violation was occurring bears the burden on appeal to satisfy the plain error rule pursuant to Fed. R. Crim. P 52(b). *Id.* at 7(a).

At the outset, it is important to emphasize that under the facts of this case it seems somewhat misleading to identify a claim of a Rule 11 violation raised for the first time on appeal as a "forfeited" claim. Petition for Writ of Certiorari at 12. The respondent put the district court on notice that he had incompetent counsel prior to the change of plea proceeding. At the change of plea hearing, his concerns proved true. Nothing is lost or forfeited, rather, the burden shifts away from the government.

The conclusion that the panel majority failed to take into account the written plea agreement is predicated on a basic misreading of the *Benitez* opinion and applicable

precedent. The *Benitez* majority correctly followed Rule 11 principles, as articulated in *Vonn*, "the rule meant to ensure that a guilty plea is knowing and voluntary." The court reasoned that although the omitted Rule 11(e)(2) "warning" was contained in the written plea agreement, that language was "boiler-plate" and in English. The respondent, who spoke and read just Spanish, could communicate to the court only through an interpreter. *Id.* at 6(a).

The Solicitor General cites to out-of-circuit case law that are not in conflict with *Benitez*, but, merely distinguishable on their facts. In *United States v. Camacho,* 233 F.3d 1308, 1322 (11th Cir. 2000), the defendant got the "full benefit of the bargain" and could not bear the requisite burden regarding the ultimate sentence. In the instant case, the respondent met his burden because his sentence was not what he bargained for; rather he received a much higher sentence than anticipated by him, his counsel, and the government. In *United States v. Saxena*, 229 F.3d 1 (1st Cir. 2000), the First Circuit held that although the particular Rule 11 warning was not a part of the change of plea colloquy at a particular stage in that hearing, it was nevertheless given at a later time in the same proceeding. In this case, the respondent was never warned in open court, *at any time*, that he could not withdraw his guilty plea if the court did not abide by the sentencing recommendations.

United States v. McCarthy, 97 F.3d 1562, 1576 (8th Cir. 1996), is a pre-*Vonn* decision. The Eighth Circuit noted that the defendant had met with his attorney "30 or 40 times" and that they had "discussed the terms of the plea agreement on several occasions," the defendant spoke

English, was "a prominent local business man who possessed a master's degree in behavioral science," had done some doctoral work and was a "university certified chemical dependency counselor." Nor, and most importantly, did the *McCarthy* defendant ever evidence or claim any confusion or misunderstanding about the Rule 11 omission.

These facts are decidedly distinct from those in respondent's case. He clearly expressed confusion and misunderstanding. Respondent: 1) has little education; 2) can not speak or read English except through a Spanish interpreter and the plea agreement was presented to him in English; 3) early in the proceedings, requested a substitution of attorney because he could not communicate or get along with his appointed counselor; 4) told the district court he did not understand the laws and procedures of the United States; 5) wrote letters to the judge claiming he felt railroaded into taking his plea; and 6) petitioned the court for aid because procedures were not properly explained to him.

Contrary to the Solicitor General's assertions, the panel majority directly addressed and rejected petitioner's claim that the plea agreement by itself is sufficient to put the appellant on notice of the omitted Rule 11(e)(2) warning. After a full review of the record, the panel majority found that the signed plea agreement without an independent confirmation from a transcript was not conclusive but merely "suggestive" that the respondent might have understood the consequences of his guilty plea.

Reliance on a plea agreement written in English without more is insufficient to accord any understanding

to the respondent. The Solicitor General can offer no assurance that the Spanish translator correctly read the "no withdrawal of the guilty plea" language. For this type of assurance, the court needs a transcript of the translation of the Rule 11(e)(2) warning, and this is not in the record. For a more accurate type of assurance, the government should have provided a Spanish language plea agreement, which was not done in this case.

C. The Administration Of The Criminal Justice System.

> While the concept of convicting an innocent person is a terrible imperfection of our justice system; an innocent person pleading guilty is inexcusable.[3]

In its petition at page 28, the Solicitor General characterizes as "regrettable" that judges and defense counsels commit Rule 11 errors. However, these "regrettable" errors may manifest in the innocent being incarcerated. Despite concerns for wrongful convictions, the petitioner argues that the justice system depends on the occurrence of guilty pleas and the negotiation of plea agreements. To support this argument, the petitioner cites to this Court's decision in *United States v. Ruiz*, 536 U.S. 622 (2002), and to statistics documented by the Department of Justice. However, *Ruiz* cannot be so narrowly quoted:

> And in any case, as the proposed plea agreement at issue here specifies, the Government will provide "any information establishing the factual

[3] Hessick and Saujani, *Plea Bargaining*, supra Note 2 at 19.

> innocence of the defendant" regardless. **That fact, along with other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11**, diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty. Cf. *McCarthy* v. *United States*, 394 U.S. 459, 465-467 (1969) (discussing Rule 11's role in protecting a defendant's constitutional rights). (highlights not included in original) (*Id.* at p.232)

The Department of Justice statistics do not reflect the frequency of wrongful convictions. As a result, the petitioner's data on federal convictions is suspect. To obtain this type of information, particularly those wrongful convictions based upon guilty pleas or negotiated plea agreements, one must look to the private sector. The collections compiled by either private institutions or private individuals are overwhelmingly concerned with state-based cases rather than federal prosecutions. However, there is no reason to think that instances of wrongful convictions occur any less in the federal judicial system.

As leading experts in the field of false confession research, Professors Richard Ofshe and Richard Leo state, "If it seems counter-intuitive that an innocent person would confess falsely, the specter of an innocent false confessor pleading guilty seems fantastic. Yet this is not uncommon."[4] Ofshe and Leo's collection of 60 wrongful

[4] Richard A. Leo and Richard J. Ofshe, *The Consequences Of False Confessions: Deprivations Of Liberty And Miscarriages Of Justice In The Age Of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429 (1998).

conviction cases includes seven, or 12% having resulted from a guilty plea.

False confession experts, Professors Steven Drizin and Richard Leo, have assembled a collection of 125 cases of wrongful convictions. Fourteen or 11% of the 125 individuals in their study chose to plead guilty rather than face trial despite the fact that they were innocent.[5]

Following the Solicitor General's reasoning under a plain error review, there will be a relaxing of the constitutional standard for knowing, voluntary and intelligently made guilty pleas. If "speculation" and "suggestion" replace these judicial axioms, then the Rule 11 safeguards will be eroded and even more wrongful convictions will certainly occur.

CONCLUSION

The Ninth Circuit panel majority correctly found that respondent's substantial rights were violated when the district court failed to warn him that he could not withdraw his guilty plea if the court did not go along with the sentencing recommendations. This conclusion is correct. It is not contrary to any precedent of this Court and does not create an intra-circuit or inter-circuit split or raise any

[5] Steven A. Drizin & Richard A. Leo, *Police Induced Confessions in the Post-DNA Age*, 82 N.C. L. Rev. (forthcoming March 2004).

question of exceptional importance. The Petition for a Writ of Certiorari should be denied.

Dated: November 3, 2003

Respectfully submitted,

MYRA D. MOSSMAN, ESQ.